In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-355

CHARLES E. LOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action under the Federal Tort Claims Act, seeking recovery for personal injuries that he sustained while on active duty in the United States Army as a result of alleged malpractice by military doctors at the United States Army Hospital, Fort Polk, Louisiana. The district court dismissed the suit and the court of appeals affirmed (Pet. 12-14), on the authority of *Feres* v. *United States*, 340 U.S. 135.

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained incident to their service and resulting from the negligence of others in the armed forces. Like petitioner, two of the claimants involved in *Feres* sustained injuries allegedly caused by the medical malpractice of military doctors at military hospitals. Since the operative facts of this case are identical to those in *Feres*, the court below correctly dismissed petitioner's claim. Nor, contrary to petitioner's assertion (Pet. 5-7), is there a conflict of decisions. Without exception, the courts of appeals have held that *Feres* bars a serviceman's claim for injuries allegedly sustained as a result of malpractice at a military hospital. See, *e.g.*, *Henning* v. *United States*, No. 19,088, C.A. 3, decided July 13, 1971; *Buckingham* v. *United States*, 394 F. 2d 483 (C.A. 4); *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

[1] *Hale* v. *United States*, 416 F. 2d 355 (C.A. 6), on which petitioner relies, involved a claim arising from an automobile accident that occurred outside a military base. The court there explicitly recognized that *Feres* involved "quite different" circumstances and thus was distinguishable (416 F. 2d at 357).

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